STATE OF NEW YORK
TOWN OF GREENBURGH

In the Matter of the Incorporation of the
VILLAGE OF EDGEMONT
to be located in the Town of Greenburgh
in Westchester County, New York.

DECISION

PAUL FEINER, Supervisor.

On May 28, 2019, a petition to establish the Village of Edgemont was filed with me, as the Supervisor of the Town of Greenburgh. The petition is accompanied by a description of the area proposed to be incorporated, an affidavit of Sharyn E. Lewis, sworn to May 28, 2019, an affidavit of Shannon R. Feldman, also sworn to May 28, 2019, a letter dated May 24, 2017 from Theodore J. Haines, P.L.S. of Tectonic Engineering & Surveying Consultant P.C. to the Edgemont Incorporation Committee, a 55-page document entitled "List of Regular Inhabitants," and 342 pages of signatures, each beginning with the heading "Petition for Incorporation: By signing my name below, I certify that I have read the preceding information, I am familiar with its contents and purpose and the boundaries of the territory sought to be incorporated." A copy of the petition is annexed as Exhibit A.

The Village Law of the State of New York imposes on me, as Town Supervisor, the responsibility to determine whether the petition complies with New York State law.[1] To help me make a decision that is based on the law, the Town retained a law firm that specializes in municipal law and, specifically, former New York State Appellate Division Justice Robert Spolzino (appointed by both a Republican and Democratic Governor), to provide me with legal advice about

[1] Village Law §2-208(1).

the Edgemont incorporation petition.

This is not the first petition I have received for the incorporation of the Village of Edgemont. The previous petition was filed on February 27, 2017. I determined, in a decision dated May 5, 2017, which was filed in the office of the Town Clerk of the Town of Greenburgh on May 9, 2017, that the 2017 petition did not satisfy the statutory requirements of Article 2 of the Village Law because (i) that petition did not describe the area proposed to be incorporated with common certainty, (ii) that petition did not contain the requisite number of signatures and (iii) that petition did not include a reasonably accurate list of the regular inhabitants of the area proposed to be incorporated. A copy of that decision is attached as Exhibit B.

The proponents of that petition brought a proceeding under CPLR article 78 in the Supreme Court of the State of New York to review my determination. In a decision, dated October 17, 2018, the Appellate Division dismissed the proponents' petition, holding that I had correctly determined that "the petition for incorporation failed to include a description of the territory to be incorporated that was 'sufficient to identify the location and extent of such territory with common certainty,' as is required by Village Law § 2-202(1)(c)(1)" and that "the petition for incorporation did not include an accurate list of the regular inhabitants of the proposed village, as is required by Village Law § 202-2(1)(c)(2)" [sic].[2] The Court of Appeals denied the proponents' request for leave to appeal on February 19, 2019.[3] Copies of those decisions are attached as Exhibit C.

In accordance with the procedure required by the Village Law, I held a public hearing to hear objections to the current petition on July 16, 2019. The Village Law requires that notice of the hearing be given by publication and posting within 20 days after the petition is filed and that

[2] *Matter of Bernstein v. Feiner*, 165 A.D.3d 924 (2d Dep't 2018).

[3] *Matter of Bernstein v. Feiner*, 32 N.Y.3d 915 (2019).

the public hearing be held "not less than twenty nor more than thirty days after the date of the posting and first publication of" the notice.[4] On June 16, 2019, the Greenburgh Town Clerk posted notice of the public hearing in three Edgemont schools, in a supermarket in Edgemont and on the Town's website. In addition, the Town Clerk published notice of that hearing in The Journal News on June 16, 2019 and June 17, 2019 and in The Scarsdale Inquirer on June 21, 2019. Copies of the affidavits of publication are attached as Exhibit D. Everyone who wanted to present objections to the petition was permitted to do so at the hearing. A transcript of the public hearing is annexed as Exhibit E. I also received written objections at the hearing. Copies of the written objections are attached as Exhibit F.

Mark Lafayette objected to the hearing when it began on the ground that the hearing had not been commenced within the time prescribed by the Village Law. I have considered that objection and find it to be without merit. The objection is based on the fact that notice of the public hearing was posted prematurely on June 10, 2019, but was removed later the same day and re-posted on June 16, 2019. I never authorized the first posting of that notice and, at the time that notice was posted, I had not yet approved the date of the public hearing. I rescinded the notice immediately as soon as I learned that it had been posted and no notice of a public hearing was ever published in the newspaper in connection with the first posting.

The Village Law requires that filing of the petition be posted within 20 days of filing in five public places in the territory ***and*** published in designated newspapers and that a hearing be held between 20 and 30 days after "the date of the posting ***and*** first publication of such notice."[5] The hearing was held between 20 and 30 days after the notices were first both posted and published

[4] Village Law § 2-204.

[5] Id.

in the newspaper on July 16, 2019. That satisfies the statutory requirement. The inadvertent posting six days earlier does not change that.[6] And, even if it did, no one was, or could have been, prejudiced by the additional notice. Consequently, all of the objections submitted were timely. There is no reason to delay the determination of the sufficiency of the petition or incur additional expense for a new hearing to cure an insignificant defect, even if there was a defect, that resulted in more, not less, notice of the hearing.[7]

The Village Law requires that I make my decision within 10 days of the close of the public hearing and that I file that decision with the Town Clerk within 15 days of the close of the public hearing.[8] After carefully considering all of the testimony that I heard at the public hearing and everything that has been submitted, and after giving very careful consideration to this decision, I have decided, for the reasons that follow, that the petition does not comply with the requirements of Article 2 of the Village Law.

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[6] Village Law § 2-204 sets forth a timeline that, under the facts here, was not affected by the erroneous early posting, and my subsequent un-posting and reposting. The starting point is the filing of the Petition, which occurred on May 28, 2019. Under the statute, public posting and newspaper publication must occur within 20 days of the filing of the petition. In addition, the hearing must occur within 30 days of two separate events occurring. Both events must occur for the 30 day clock to commence running: (1) the public posting of the petition; and (2) the date of first publication in a designated newspaper. Here, these two events occurred on different dates, so the date of first publication in the newspaper is the trigger for the commencement of the 30 day clock. The timeline here is as follows:

1) Date of filing of the petition - this starts a 20 day countdown during which the posting and 2 newspaper publications must happen. Filing occurred on May 28th (reflected on town website). 20 days from May 28 is June 17th.

2) Date of posting - this needed to occur by June 17th. This happened on either June 10th (first erroneous posting) or June 16th (authorized posting). Both postings were timely.

3) Dates of publication - two publications in the designated newspaper(s) needed to happen by June 17th. The Journal News published on June 16th and 17th. The first date of publication determines the deadline for hearing (below). Both newspaper publications were timely.

4) Deadline for hearing - the hearing must take place within 30 days of the first date of publication (here, June 16th). So, the hearing needed to happen by July 16th. The hearing occurred on July 16. The hearing was timely and the objections filed at the hearing were timely.

[7] Although persons other than objectors expressed a desire to speak at the hearing, the Village Law does not provide authority or a procedure to allow persons not objecting to the legal sufficiency of the Petition to offer testimony or documentary evidence at the hearing.

[8] Village Law § 2-208(1), (2).

1. **The petition, when signed, failed to include an accurate list of regular inhabitants Every page of the petition, therefore, contains a statement that, through no fault of the signer, is demonstrably false.**

Village Law § 2-202(c) requires that "[e]ach copy of the petition shall have attached thereto prior to the signature pages" a description of the territory proposed to be incorporated and a list of the names and addresses of the regular inhabitants of that territory ("LORI"). These two required documents were attached to the petition when it was submitted on May 28, 2019. But the submissions that accompany the petition, most notably the affidavit of Sharyn E. Lewis, establish that the list of regular inhabitants that was attached to the petition when it was submitted could not have been attached to the petition when it was signed. That violates the requirement of Village Law § 2-202(c) that "[e]ach copy of the petition shall have attached thereto prior to the signature pages" a list of the names and addresses of the regular inhabitants of that territory.

The dates of the signatures, and the dates on which the witness statements were notarized, establish that the vast majority of the signatures, 1,642 of 1,722, were collected between May 26, 2017 and November 26, 2017. Only 39 signatures were collected in 2018 and 61 in 2019. The affidavit of Sharyn E. Lewis, which was submitted with the petition and is included as part of Exhibit A, establishes, however, that the list of regular inhabitants was not even prepared until 2019. Ms. Lewis states that "[d]uring the months of February, March, and April 2019, the EIC sought household information," and specifies the actions the committee undertook during that period to obtain information. She further states that the EIC emailed area pre-school directors on March 25, 2019, and that it obtained only statistical enrollment data with neither names nor addresses from the Edgemont Union Free School District on April 8, 2019. The list purports to represent "as true an accurate a list as possible of all residents living within the boundaries of the

proposed Village of Edgemont as of May 3, 2019."

The affidavit of Sharyn Lewis also states that "In May 2017, and periodically thereafter (July, September, and October 2017; January, February, June and December 2018; and March and April 2019), our group of volunteers requested in writing from the Westchester County Board of Elections ("WCBOE") the voter registration rolls for all election districts ("ED's") that contain voters who live within the Greenville Fire District ("GFD"): 33, 34, 35, 36, 49, 69, 70, 75. With each request from the WCBOE, we updated our records with newly registered voters. Our final request was made on April 29, 2019." Ms. Lewis states "We started our LORI with all the residents of the Proposed Village of Edgemont contained in our Qualified Voters List." Ms. Lewis' affidavit thus makes clear a significant aspect of the list of regular inhabitants, namely, the Qualified Voters List, was incomplete in 2017 when 1,642 signatures were obtained and in 2018 when 39 signatures were obtained. These signers from 2017 and 2018 did not sign the petition when the List of Qualified Voters that was used for the list of regular inhabitants attached to the petition that was filed on May 28, 2019, even existed.

Ms. Lewis' admissions thus establish that the list of regular inhabitants was not prepared until after the last signatures were taken and, therefore, the list of regular inhabitants could not have been properly attached to the petition in 2017 or 2018 when the residents who signed the petition in 2017 and 2018 signed it. Village Law § 2-202(c) requires, however, that the list be attached to the petition "prior to the signature pages." The requirement that the list be attached "prior to the signature pages" does not just mean that the documents constituting the petition can be changed by the proponents' insertion into the petition, after the petition is signed, of a list that did not exist until after the residents had signed. It means that the list must be a part of the document that was available to the residents before they signed the petition. That was not the case here.

The residents who were asked to sign the petition, and did sign it, had no reason to know that the list of regular inhabitants was required to be attached to the petition when they signed it, and they did not know when they signed the petition that the petition would be altered later by its proponents to attach the list. Each page of the petition begins as follows:

> "Petition for Incorporation: By signing my name below, I certify that I have read the preceding information, I am familiar with its contents and purpose and the boundaries of the territory sought to be incorporated."

Persons making this certification and attestation in 2017 and 2018 could not possibly have been familiar with the contents of the list of regular inhabitants that had not yet been developed or attached to the petition until May 2019. By belatedly attaching the list of regular inhabitants after the residents signed the petition, the proponents of the petition rendered this statement by every resident who signed the petition false. When the signatures taken, the list of the names and addresses of the regular inhabitants of the territory proposed to be incorporated, which is a required part of the "preceding information," did not precede the signature page. False statements in petitions make them invalid.[9]

In sum, there are two separate, and independent, reasons why virtually all but 61 signatures to the petition are facially invalid and should not be counted. First, in violation of Village Law §§ 2-202(1)(b)(6) and (1)(c)(2), the signatures obtained to the Petition in 2017 and 2018 were not obtained with the correct required exhibit (a current list of regular inhabitants) attached to the petition at the time of signature. The Affidavit of Sharyn Lewis is clear that the list of regular inhabitants that was attached to the petition at the time it was filed on May 28, 2019, had been updated several times in 2019 in multiple respects, including with respect to the Qualified Voters

[9] See *Matter of Ramos v. Gomez*, 196 A.D.2d 620, 621 (2d Dep't 1993); *Lemishow v. Black*, 104 A.D.2d 460, 462 (2d Dep't 1984).

List. Therefore, the 2019 version of the list of regular inhabitants (which is the attachment to the pending petition) could not possibly have been attached to the versions of the petition signed in 2017 and 2018. Second, in violation of Village Law §§ 2-202(1)(b)(6), (1)(c)(2), and (1)(e)(1) and(1)(e)(2), each required certification for signatures obtained in 2017 and 2018 is either false or inaccurate because the certification attests to the signatory's familiarity with "the contents" of the petition that was filed on May 28, 2019. Because the contents of the petition includes the required exhibits (i.e., the list of regular inhabitants), it is not possible for someone that signed a certification in 2017 or 2018 to be familiar with the contents of a 2019 version of the list of regular inhabitants that, according to the Affidavit of Sharyn Lewis, was updated throughout 2018 and 2019, and that did not even exist until May 2019. After disqualifying the signatures from 2018 and 2019, the petition fails the 20% requirement of Village Law § 2-202(1)(a)(1).

2. The list of "regular inhabitants" of the territory proposed to be incorporated is not complete, as the statute requires.

Michael P. Schwartz and Hugh Schwartz object to the petition on the ground that it does not contain an accurate "list of regular inhabitants" of the area proposed to be incorporated. Their objection is that the list is defective on it's face because 1,880 children by the count of proponent Sharyn Lewis and 2,003 children, by Michael P. Schwartz's count, out of the estimated 2400 residing in the area proposed to be incorporated, are identified only as "Minor Doe," and many more are not identified by name at all.

Village Law § 2-202 requires that "[e]ach copy of the petition shall have attached thereto prior to the signature pages: . . . (2) A list of the names and address of the regular inhabitants of such territory." Village Law § 2-202(c)(2). The statute further makes clear that minor children are "regular inhabitants" unless they reside with someone who has a voting address outside the

proposed village. It states:

> The words "regular inhabitants" as used herein and for the purpose of this article shall include all persons residing in the territory proposed to be incorporated except such persons who themselves, or who are persons under the age of eighteen years residing with persons who, maintain a residence outside such territory which is used as their address for purposes of voting.

Village Law § 2-200(2). A plain reading of the statute thus requires that the list of regular inhabitants include the names and addresses of minor children who reside within the area proposed to be incorporated.

The affidavit of Sharyn Lewis attached to the petition sets forth in great detail all of the efforts undertaken by her and the Edgemont Incorporation Committee to ascertain the names and addresses of all of the regular inhabitants of the territory proposed to be incorporated. Those efforts were, at best, insufficient to compile an accurate list. But even if they were, the affidavit clearly establishes that the list is not accurate.

Ms. Lewis acknowledges that on December 12, 2018, after receiving an email from an Edgemont resident requesting the names and addresses of all minor children residing in the Edgemont Union Free School District (EUFSD), the "Assistant Superintendent of the EUFSD, flatly denied the ... request" citing "unacceptable safety risks." She further acknowledged that although the EIC emailed seven area pre-school directors on March 25, 2019, in an attempt to determine the number of Edgemont minor children enrolled in preschool, six of the seven pre-school directors did not respond to her email and that the one school that did respond refused to disclose any enrollment information regarding minor children. Moreover, although the Assistant Superintendent of the EUFSD subsequently provided a document indicating that there were 2,047 students enrolled in the EUFSD during the 2019/2020 school year, Ms. Lewis concedes that the document failed to reflect the number of students residing outside of Edgemont who pay tuition to

attend the School District. The EIC's emails and postcards seeking information from 2300 NextdoorEdgemont.com members, and over 3000 Edgemont email addresses as well as 4356 people who received USPS postcards yielded approximately 300 responses of which 123 refused to allow their children's names to be included in the list. The affidavit reflects no other attempt to ascertain the names and addresses of children younger than pre-school age. And there was no showing in the petition that other options were pursued such as going door to door or taking out newspaper ads.

The affidavit of Ms. Lewis effectively admits that the list of regular inhabitants is inaccurate because the EIC had no way to determine the exact number of children residing within the proposed territory to be incorporated and simply guessed that 2,400 minors resided within that territory. The inclusion in the list of "Minor Does" of children, with no first names listed increasingly establishes, that the list as submitted is not complete. It does not contain the names and addresses of the children whom the proponents acknowledge are regular inhabitants of the territory proposed to be incorporated, as the statute requires.

I fully understand the reluctance of a parent to allow his or her children to be identified by name in a publicly available document. I also understand why the Edgemont Union Free School District could not make available to the Edgemont Incorporation Committee the names of the children registered in the district and why area pre-schools would not respond to the EIC's inquiry. Nevertheless, there is no exemption in the statute for the names and addresses of regular inhabitants that the petition proponents are unable to obtain. Nor is there sufficient evidence that the petitioners took sufficient steps to ascertain the true number of children who are regular inhabitants of the territory.

The Appellate Division, Second Department, has made it clear that the petition must comply strictly with the statutory requirements, including the requirement that the list of regular inhabitants be complete.[10] The fact that one appellate panel in the Appellate Division, Third Department, disagrees[11] does not change that. I am bound by the law as established in the Appellate Division, Second Department. There is no basis in that law on which I can ignore the fact that the children who reside in the territory proposed to be incorporated are "regular inhabitants" of that territory whose names are required to be included in the list of regular inhabitants submitted with the petition. Since it is clear on the face of the list attached to the petition that it fails to include nearly any of the full names and addresses of the children who reside in the area, the list of regular inhabitants and, consequently, the petition, do not satisfy the statutory requirement in this regard and the petition must be rejected.

3. The signatures taken long before the petition was submitted cannot be counted; without them, the petition does not contain the requisite number of valid signatures.

Mona Silverberg Fraitag objected that the petition does not contain the required number of signatures because 1,672 of 1,722 of the signatures "were obtained in 2017, fully two years before the May 28, 2019 Petition was filed, and must be deemed stale under a rule of reason." Similarly, William Paul Weintraub objected that "signatures that were collected in 2017 but that were unused

[10] See *Baker v Heaney*, 15 A.D.3d 577, 578 (2d Dep't 2005) ("The petition for incorporation was legally insufficient in that it did not include an accurate list of the regular inhabitants of the territory sought to be incorporated (*see* Village Law § 2–202[1][c][2]"); see also *Matter of Elevitch v. Colello*, 168 A.D.2d 681 (2d Dep't 1990) ("The petition for incorporation was legally insufficient in that it did not include a "complete" list of the regular inhabitants of the territory in accordance with clear statutory mandate"); *Matter of Luria v. Conklin*, 139 A.D.2d 650 (2d Dep't 1988) ("The petition for incorporation was legally insufficient in that it did not include a *complete* list of the regular inhabitants of the territory in accordance with the clear statutory mandate." [emphasis in original]); *Matter of Incorporation of Vil. of Viola Hills*, 129 A.D.2d 579, 580 (2d Dep't 1987) ("[T]he petition was legally insufficient in that it was not accompanied by a *complete* list of the regular inhabitants of the territory in accordance with the clear statutory mandate (see, Village Law § 2–202[1][c] [2])" (emphasis in original).

[11] See *Matter of Defreestville Area Neighborhood Ass'n, Inc. v. Tazbir*, 23 A.D.3d 70, 76 (3d Dep't 2005).

and not submitted until 2019 are presumptively stale," noting that "[w]ith the passage of time, persons will age from being minors to adulthood . . . people will move away, people will move in, people will die, and children will be born." I find those objections to be valid.

The purpose of signing a petition is to demonstrate the signers' present support for a proposition. The obvious concern with old signatures is that the passage of time may misrepresent the current intentions of persons who signed in the past. Here, more than two-thirds of the signatures, 1,163 of 1,722, were taken in June 2017, a full 23 months before the petition was filed, and only a handful, 107, were taken since the most recent local election.

Article 2 of the Village Law does not on its face indicate the time within which the signatures on an incorporation petition must be signed. Nevertheless, in *Matter of Jacobs v. Ocker*,[12] the Appellate Division, Second Department, imposed a "rule of reason" on the time within which signatures may be obtained in similar situations, in order to avoid counting signatures which may no longer reflect the signers' present support for the petition. While the Appellate Division declined to impose the six-week deadline for obtaining signatures established by the Election Law, it held, in a proceeding concerning a petition to establish a ward system for the election of council members in the Town of Oyster Bay, that signatures between four and six years old "must be deemed stale under a rule of reason."[13] Here, an overwhelming majority of the signatures were nearly two years old when the petition was filed. *Matter of Jacobs v. Ocker* requires me to determine whether those signatures may validly be considered or must be rejected as stale because they do not establish the signers' present intent to support the incorporation of a new Village of Edgemont.

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[12] 123 A.D.2d 801 (2d Dep't 1986).

[13] 123 A.D.2d at 803.

The critical factor in my analysis is whether the relevant circumstances have changed significantly in the approximately two years since most of the signatures on the petition were obtained. There are a number of reasons to believe that they have. There is a new Town Board since the signatures were taken. A local election was held for Town Supervisor and two members of the Town Board in November of 2017. A new Town Councilman has replaced another Town Board member who, sadly, passed away. In addition, a new organization of Edgemont residents opposed to incorporation, Keep Edgemont Inc., was formed to provide information to residents of Edgemont regarding the risks associated with incorporation. According to that organization's website, keepedgemont.com, those Edgemont residents have studied the pros and cons of incorporating and have concluded that incorporation is not in the best interests of the Edgemont community. Among their stated concerns are lack of access to emergency services, such as police and ambulance services, no access to commuter parking and the unavailability of funds for parks and recreation.[14] This website did not exist at the time the signatures were solicited. In addition, the submission of the 2017 petition has caused many residents to be concerned that it is unfair for the decision about the proposed incorporation, which will have significant impacts on the Town, should be made only by those Town residents who live in the territory proposed to be incorporated.

For all of these reasons, there are serious doubts as to whether a resident who signed the petition in 2017 would still support the incorporation today. Therefore, under the "rule of reason" established by the Appellate Division in *Matter of Jacob v. Ocker*, those signatures are stale and cannot be counted. Because the number of signatures remaining after the stale signatures are

[14] Also, since 2017, the Town has repaved roads, funded and implemented traffic and pedestrian safety initiatives and addressed infrastructure concerns. Limitations imposed since 2017 on the federal income tax deduction for state and local taxes suggest that it is less likely that residents would today support the creation of an additional taxing jurisdiction.

eliminated is insufficient to satisfy the statutory requirement that the petition contain the signatures of 20 percent of the residents of the territory proposed to be incorporated qualified to vote for town officers[15], the petition fails to satisfy the statutory requirements.

Ms. Fraitag further objected that the petition does not contain the required number of signatures because 1,672 of 1,722 of the signatures were obtained while "a previous Petition for Incorporation filed on February 27, 2017 was still outstanding and had not been ruled upon or finally determined," is not valid. Village Law § 2-208(3) provides that if the supervisor determines that a petition for incorporation is invalid, "a new proceeding for incorporation may be commenced immediately." In *Matter of Luria v. Conklin*[16], the Appellate Division, Second Department, held that the Supervisor of the Town of Ramapo "was precluded from approving the petition" because it proposed the incorporation of areas that were included in other incorporation petitions then in the appellate process. Here, however, the appellate process with respect to the prior incorporation was concluded by the time this petition was submitted. Nothing in *Matter of Luria*, and nothing in the statute, precludes the collection of signatures on a second incorporation petition before the appellate process with respect to the first is concluded. The objection to the signatures collected before the appellate process with respect to the first petition was concluded is, therefore, rejected.

4. **The petition does not contain a description of the territory proposed to be incorporated that is either a metes and bounds description; (b) a description made with reference to existing streets and navigable waters or a combination of same; or (c) a map showing existing streets and navigable waters or a combination of same forming boundaries or metes and bounds or the entire boundaries of one or more districts of an entire town.**

Village Law § 2-202(c)(1) requires that either a metes and bounds description, a description

[15] Village Law § 2-202(1)(a)(1).

[16] 139 A.D.2d 650 (2d Dep't 1988), lv. denied, 73 N.Y.2d 704 (1989).

with reference to existing streets or a map describing the territory proposed to be incorporated be attached to the petition. It provides:

> Each copy of the petition shall have attached thereto prior to the signature pages: (1) A description of such territory sufficient to identify the location and extent of such territory with common certainty and which shall be in one of the following forms or a combination thereof: (a) a metes and bounds description; (b) a description made with reference to existing streets and navigable waters or a combination of same; or (c) a map showing existing streets and navigable waters or a combination of same forming boundaries or metes and bounds or the entire boundaries of one or more districts of an entire town.

The petition fails to satisfy this requirement. A "metes and bounds description" is just that – a description of property according to measures of length and boundaries.[17] Black's Law Dictionary (11th ed. 2019) defines the term "metes and bounds" as "[t]he territorial limits of real property as measured by distances and angles from designated landmarks and in relation to adjoining properties" and as "[t]he method of describing a tract by limits so measured, esp. when the descriptions of the limits are arranged as a series of instructions that, if followed, result in traveling along the tract's boundaries." The boundary lines between New York and Pennsylvania and New York and New Jersey, for example, are metes and bounds descriptions.[18] The description attached to the petition is not a "metes and bounds" description. It contains no distances or angles at all. It simply describes lines from one property to another.

The description also fails to define the territory proposed to be incorporated by references to ***existing*** streets or waterways or the entire boundaries of a district within a town. There is only one reference in the description to a street and that is to the center line of Central Avenue. And there is no reference to the entire boundary of any district. There have also been significant changes

[17] See New York Law of Real Property § 24:50.

[18] See State Law §§ 6, 7.

to the territory proposed to be incorporated that are not reflected in the description attached to the petition.

5. The petition does not describe the territory proposed to be incorporated with "common certainty."

Michael P. Schwartz, Martin Payson and Philip D. Chonigman object to the petition on the ground that it does not describe the territory proposed to be incorporated with "common certainty." For the reasons that follow, I sustain their objections.

Village Law § 2-200(1)(b) requires that the territory proposed to be incorporated be "coterminous with the entire boundaries of a school, fire, fire protection, fire alarm, town special or town improvement district." Village Law § 2-202(c)(1) requires that the petition describe the territory proposed to be incorporated with "common certainty." The reasons for these requirements are obvious. If I find that the petition complies with the statutory requirements, there has to be an election to determine the question of incorporation in which only residents of the territory proposed to be incorporated are entitled to vote in that election.[19] You cannot have an election without knowing who can vote, which you cannot know if the description of the area within the proposed new village is internally inconsistent. Similarly, if an election is held and the vote is in favor of incorporation, the town clerk has to submit a report of the incorporation to the secretary of state, the state comptroller, the commissioner of taxation and finance, the county clerk and the county treasurer.[20] The report must include "[a]n outline map and a metes and bounds description of the territory within such village which the clerk shall furnish or cause to be prepared at the original expense of the towns in which such territory is located." The town clerk will not be able to do that

[19] Village Law §§ 2-212(1), 2-216.

[20] Village Law § 2-232.

if she cannot determine from the petition whether certain parcels are in the proposed new village or outside of it.

One of the reasons I rejected the 2017 petition was that it failed to identify the territory proposed to be incorporated with "common certainty" because it defined the territory to be incorporated as that of School District No. 6, but included the inconsistent description of the Greenville Fire District that was adopted by the Westchester County Board of Supervisors in 1923. The 2019 petition purports to address this problem by eliminating the reference to School District No. 6 in the preamble to the description, by stating that the area proposed to be incorporated is that of the Greenville Fire District and by attaching to the petition a letter from Theodore J. Haines, P.L.S., of Tectonic Engineering & Surveying Consultants, P.C. stating that the 1923 description contained in the petition matches a 1934 map of the Greenville Fire District.

The current petition, nevertheless, fails to cure the deficiency, and fails to satisfy the statutory requirements, for two reasons. First, the petition purports to propose to incorporate the territory defined by the boundaries of the Greenville Fire District, but those boundaries are not, themselves, defined with "common certainty" based upon well-documented ongoing, current, unresolved boundary disputes with the Hartsdale Fire District regarding certain shared boundaries. Second, the description attached to the petition is in fact an older version of a description of School District No. 6, not the current Greenville Fire District. So even if the territory of the Greenville Fire District were defined with "common certainty," the description the petition contains does not describe that territory with the required "common certainty." It is misleading for the petition to purport to propose the incorporation of the territory that is the Greenville Fire District when it is, in fact, proposing the incorporation of the territory that comprises School District No. 6.

As to the lack of common certainty, the stated intent of the proponents to incorporate as a

village the area that comprises the Greenville Fire District is clear from statements throughout their submission. For example, the affidavits of Sharyn Lewis and Shannon R. Feldman both state that they reside within the boundaries of the Greenville Fire District and the proposed Village of Edgemont and the determination of the number of qualified voters and the list of regular inhabitants attached to the petition, as described in these affidavits, are both apparently based on the residents and regular inhabitants of the Greenville Fire District. But those expressions of their intent do not satisfy the statutory requirement that the territory proposed to be incorporated be described with "common certainty."

Despite the 1923 resolution, the boundaries of the Greenville Fire District, are not defined with "common certainty," or even any certainty. In fact, those boundaries have been the basis of a longstanding boundary dispute between the Greenville Fire District and the Hartsdale Fire District, which continue today as it has for the past 95 years. This is largely because on August 6, 1923, one month after establishing the Greenville Fire District, the Westchester County Board of Supervisors created the Hartsdale Fire District, the territory of which overlaps the territory of the Greenville Fire District, creating boundary disputes that have existed for 95 years. The evidence of the discrepancies submitted by the objectors explains those discrepancies in detail.

The affidavit of Steven J. Willard, who is the President of Ward Carpenter Engineers, Inc., the same firm that prepared the 1899 school district map, lays out the boundary discrepancies on the basis of his review of the documentary history of the dispute from 1923 to the present. Mr. Willard opines that the 1923 description is not consistent with a 1937 map and a 1976 map of the school district and does not reflect "any true boundary of a present fire or school district." He has also reviewed the 1934 map purporting to set forth the current boundaries of the Greenville Fire District. His opinion was:

> [B]ecause the Hartsdale Fire District was established using an election district which included properties covered by the Greenville Fire District, the 1934 map include in the petition does not reflect the current overlap of properties in both districts.

This dispute is longstanding and not a new issue. An affidavit by Helen Orce, a Commissioner of the Greenville Fire District since 2006, which was submitted with respect to the 2017 petition, and has been re-submitted here, explains that the boundaries of the Greenville Fire District have been in dispute for as long as she has been a commissioner and recites examples of those discrepancies. A 1967 report by Arthur Greenbaum, also submitted in opposition to the petition, reflects in detail that the boundary dispute goes back to at least 1932.

The 1934 map, which proponents did not include in the petition, to which Mr. Willard referred was also reviewed by Theodore J. Haines, P.L.S. of Tectonic Engineering & Surveying Consultant P.C., in a letter dated May 24, 2017 to the Edgemont Incorporation Committee. Mr. Haines' letter recites that Mr. Haines has reviewed the legal description in the 1923 minutes and a 1934 map and states his conclusion that "the description . . . is a fully retraceable metes and bounds description of the Greenville Fire District and therefore meets the requirement for common certainty under the Village Law." There is no way to confirm that statement is true, but even assuming a letter addressed to a private citizen has probative value in this proceeding, it adds nothing to the analysis. The fact that the 1923 description can be traced against a 1934 map that is not attached to the petition, and the origin or legitimacy of which is not explained or supported in the record, does not contradict the substantial evidence that there is, and for quite some time has been, uncertainty about the boundaries of the Greenville Fire District. The affidavit of Steve Willard further states "[O]n April 26, 2019, I had a meeting with some of the Board Members of the Greenville Fire District regarding the discrepancies and disputes as to the common boundary

of the Greenville and Hartsdale Fire Districts." This issue of boundary disputes between the Greenville and Hartsdale Fire Districts, which share certain borders, remains unresolved at this time, as Mr. Willard's opinion states,"[T]herefore, I cannot conclude that there is "common certainty" in the description of the territory to be incorporated as the Village of Edgemont, because of both the documented boundary discrepancy between the Greenville Fire District and Hartsdale Fire District, as well as the other matters referenced." That history defeats any claim that the territory proposed to be incorporated can be defined with "common certainty" by mere reference to "the boundaries of the Greenville Fire District."

The description attached to the petition also fails to define the territory proposed to be incorporated with the required "common certainty" because it defines School District No. 6, not the Greenville Fire District. As the 1923 resolution reflects, but the description contained in Exhibit A omits, the Westchester County Board of Supervisors intended that the Greenville Fire District consist of the territory "embraced within the boundaries of School District No. 6, as laid down in a map entitled, "Map of School District No. 6, Town of Greenburgh, Westchester Co., N.Y., Scale 400 feet per inch. Ward Carpenter & Son, C. Es., June 16, 1899," and filed in the Town Clerk of said Town of Greenburgh on June 23, 1899." The reference at the beginning of the description to "said territory or district" establishes that the Board of Supervisors' intent was to create the fire district to be co-extensive with School District 6 as defined in the 1899 map. The 1923 resolution's statement that the fire district is "embraced within the boundaries of School District 6" as laid down in the 1899 map confirms this.

If the boundaries of School District 6 and the Greenville Fire District were in fact co-extensive as the Board of Supervisors minutes and resolution provide, the territories described by Exhibit A and the rest of the petition would be consistent. But, as I determined in my May 5, 2017

decision rejecting the prior petition, the territories of the two districts are not co-extensive. As I noted in my 2017 decision, Martin Payson (who also objected to that petition) cited the affidavit of John M. Martin, Esq., an attorney with experienced in real property law and title insurance issues. Mr. Martin compared the 1899 map of School District 6 referenced in the Board of Supervisor's resolution to a 1934 map of the Greenville Fire District and found a "significant description variance." Mr. Payson has re-submitted those documents as part of his objection to this petition. That conclusion is supported by the affidavit of Steven J. Willard, dated July 11, 2019, which was submitted with the objections to this petition.

I concluded in 2017 that it could not be determined from the description of the territory proposed to be incorporated as set forth in the prior petition whether between nine and eleven parcels of real property were either within or outside of the territory proposed to be incorporated. I therefore determined that the prior petition did not describe that territory with "common certainty" and failed to comply with the requirements of Article 2. The Appellate Division, Second Department upheld that my determination that the prior petition for incorporation failed to include a description of the territory to be incorporated that was "sufficient to identify the location and extent of such territory with common certainty," as is required by Village Law § 2–202(1)(c)(1). *Bernstein v. Feiner*, 165 A.D.3d 924, 926 (2d Dep't 2018), *leave to appeal denied*, 32 N.Y.2d 915 (2019).

Mr. Haines' conclusion that "the description . . . is a fully retraceable metes and bounds description of the Greenville Fire District and therefore meets the requirement for common certainty under the Village Law" does not change my mind. Even if his letter is entitled to weight here, and even assuming his factual statement with respect to the 1923 description and the 1934 map is true, it does not address the discrepancy between the boundaries of the Greenville Fire

District and the description of the boundaries of School District No. 6 that were the basis for my prior decision. It would be irrational for me to depart from my prior conclusion that the description contained in the petition does not provide the "common certainty" that is required by the statute.

Because there is a discrepancy between the boundaries of School District 6 and the boundaries of the Greenville Fire District, the parts of the petition stating that the territory of the proposed village will comprise the Greenville Fire District and the description in Exhibit A to the petition, which is based on the boundaries of School District 6, are inconsistent. The property description contained in Exhibit A is of School District 6. It quotes the description of the school district contained in the 1923 Board of Supervisors resolution based on the 1899 map referenced in that resolution. The rest of the petition, however, provides that the territory comprising the proposed village will be the same as the Greenville Fire District. Because the Greenville Fire District and School District 6 are not co-extensive, the petition is inconsistent in its description of the territory to be incorporated.

Moreover, there is abundant evidence in the record before me that boundary discrepancies exist with respect to the Greenville Fire Department in addition to the boundary conflicts found in my 2017 decision, which I incorporate here. By way of example only, I refer to the July 16, 2019 Objection submitted by Martin Payson and his 2017 Objections which he incorporates by reference, and the objection of Michael Schwartz. The record establishes the existence of a three page report dated March 6 1967, written by , Arthur Greenbaum, apparently a Greenville Fire Commissioner, in which he outlined in detail the historical discrepancies existing regarding the boundaries between the Greenville and the Hartsdale Fire companies. Further, in a letter dated August 3, 2006, Stuart Vogel, then Chairman of the Greenville Fire District wrote to the Chairman of the Hartsdale Fire district, Robert Broderick, requesting a meeting to resolve what he called

"the historical (boundary) confusion regarding certain properties on our border." With his letter he included a spreadsheet listing the seventeen (17) properties in question.

The proposed boundaries of the new village suffer another fatal defect as they do not comply with Village Law Section 2-200 (b) and (c). The law provides the "limits" of the proposed territory must be,

> b. [...] coterminous with the entire boundaries of a school, fire, fire protection, fire alarm, town special or town improvement district; or
>
> c. [...] coterminous with parts of the boundaries of more than one school, fire, fire protection, fire alarm, town special or town improvement district, *all of which are wholly contained within such limits* , and within one town[.]

As shown above the boundaries of the Greenville and Hartsdale fire companies overlap by virtue of the action of the Board of Supervisors that created the boundaries of both. Therefore, the proposed village boundaries encompass only part of the existing Hartsdale Fire District which is impermissible under the law.

A similar defect also exists with respect to the existing Edgemont School District. Two years ago, I found that the same description as is being used herein did not encompass all of the School District and that the boundaries of the existing school district and the Greenville Fire district were not coterminous. This holding was affirmed by the Appellate Division and ultimately by the Court of Appeals. Therefore, the proposed village boundaries do not comply with Village Law 2-200 (b) and (c) as they are not coterminous with the entire boundaries of either or both of the existing school and fire district, and both of these existing districts are not wholly contained

within the limits of the proposed village. On the basis of the foregoing alone, the petition must be dismissed.

The controlling law as to the legal sufficiency of an election petition where there is evidence that the boundaries are inaccurate, ill-defined and do not enjoy a common certainty is the case of *Greenberg v. Veteran*, 752 F. Supp. 630 (1990). In that case the reviewing court stated "...we need only find that the petition contained a few major uncertainties (of the boundaries) in order to conclude that it lacked common certainty." The record before the Supervisor in the instant proceeding contains evidence of numerous major uncertainties." Accordingly, the subject Petition should be dismissed as being legally insufficient and defective.

For all of these reasons, I find that the incorporation petition, taken as a whole, does not describe the territory proposed to be incorporated with the "common certainty" as required by Village Law §2-202(1)(c)(1). In fact, to the extent that the petition indicates in multiple places that the territory of the proposed village is comprised of the Greenville Fire District, it is misleading because the description attached to the petition is of School District 6. No one who signed the petition should have been expected to recognize the inconsistency or understand that the description contained in Exhibit A was of School District 6, not the Greenville Fire District. The proponents of the petition, however, should have known this, based upon my prior decision and the decision of the Appellate Division, that the Greenville Fire District and School District 6 were not co-extensive. But they still stated that the area proposed to be incorporated was the Greenville Fire District, while attaching to the petition a description of School District 6, omitting only the reference to School District 6 and the 1899 map.

The inconsistency between the boundaries of the Greenville Fire District and School

District 6, and the misleading statements in the petition that the area proposed to be incorporated was the Greenville Fire District, defeats the required "common certainty" of the description. As a result, the petition fails to satisfy the statutory requirements of Village Law § 2-200(1)(b) that the territory proposed to be incorporated be "coterminous with the entire boundaries of a school, fire, fire protection, fire alarm, town special or town improvement district" and the requirement of Village Law § 2-202(1)(c)(1) that the territory proposed to be incorporated be described with "common certainty."

For all of these reasons, I determine that the petition does not comply with the requirements of Article 2 of the Village Law.

Paul J Feiner

Paul Feiner
Supervisor
Town of Greenburgh

Dated: Greenburgh, New York
July 26, 2019